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No. 03-

IN THE

Supreme Court of the United States

GARRISON S. JOHNSON,

Petitioner,

v.

JAMES H. GOMEZ and JAMES ROWLAND,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a state's practice of routine racial segregation of state prisoners for at least a 60-day period subject to the same strict scrutiny generally applicable to all other challenges to intentional racial segregation, or is it excused from such scrutiny and subject only to the more relaxed review afforded under *Turner v. Safley*, 482 U.S. 78 (1987)?

2. Does California's practice of routine racial segregation of state prisoners for at least a 60-day period violate the Equal Protection Clause?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 321 F.3d 791 (9th Cir. 2003). Pet. App. at 1a. The Ninth Circuit affirmed the July 30, 2001, decision of the United States District Court for the Central District of California, which is unreported. Pet. App. at 32a. The Ninth Circuit's opinion denying a petition for rehearing with suggestion for rehearing en banc (with four judges dissenting) is reported at 336 F.3d 1117 (9th Cir. 2003). Pet. App. at 36a.

STATEMENT OF JURISDICTION

The court of appeals' judgment was entered on February 25, 2003. Pet. App. at 1a. A timely petition for rehearing with suggestion for rehearing en banc was denied on July 28, 2003. Pet. App. at 37a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part: "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 2.

Title 42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia,

> subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

For more than 25 years, the California Department of Corrections (CDC) has followed a practice of segregating prisoners by race in two-person cells upon arrival at or on transfer between its institutions. CDC administrators contend that security concerns related to possible violence among inmates necessitate its segregationist practice. When petitioner Garrison S. Johnson (Johnson), an African-American, first arrived at a CDC institution in 1986, CDC personnel told him that he had to be placed in a "black cell." On each subsequent occasion when the CDC transferred Johnson to a different institution, his initial cell assignment was based on his race and he was placed in a cell with another African-American.

Johnson filed his original complaint on February 24, 1995, alleging that the CDC's policy of racial segregation violated his right to equal protection under the Fourteenth Amendment. In ultimately rejecting Johnson's position, the Ninth Circuit declined to follow this Court's decision holding such segregation unlawful in *Lee v. Washington*, 390 U.S. 333 (1968), and also declined to follow this Court's decisions in a long line of cases holding that all state actions discriminating on the basis of race are subject to strict scrutiny, most recently *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003),

and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003). Instead, the court applied the more relaxed standard articulated in *Turner v. Safley*, 482 U.S. 78 (1987), which evaluated whether certain prison regulations *that were not race-based* were reasonably related to legitimate penological interests. While noting that the standard of review was outcome determinative, the Ninth Circuit declined to apply the strict scrutiny ordinarily accorded racial classifications. Pet. App. at 11a. Applying *Turner's* relaxed review, the court upheld the CDC's policy of racial segregation.

A. The CDC's Policy of Routine Racial Segregation

All newly arriving CDC inmates, whether on first assignment or on transfer, are initially housed in a "reception center." The CDC requires such inmates to complete a form that asks only: "Name/Number," "Security/Custody Level," and "Ethnicity/Race." The CDC admittedly "use[s] . . . race as *the* predominant factor" to determine double-cell housing assignments in the reception center. *Id.* at 3a, 20a (emphasis added).

Prison officials' testimony demonstrated that this CDC segregation practice stems from anecdotally-based views of the tendencies that inmates of particular races have to be violent toward inmates of other races, rather than from specific data or evidence. *Id.* at 3a-4a. The CDC bases its practice of racial segregation on the grounds that "in its experience, race is very important to inmates and it plays a significant role in antisocial behavior." *Id.* at 3a. Thus, the CDC immediately classifies inmates as "black, white, Asian, and other." *Id.* Officials further subclassify inmates based on national origin. By CDC practice, inmates of particular national origins are not housed together because, according

to CDC administrators, "they tend to be at odds with one another." *Id.* "[F]or example[,] Japanese and Chinese inmates are not housed together, nor are Laotians, Vietnamese, Cambodians, and Filipinos." *Id.* In support of its policy, the CDC offered no evidence of particular instances of racial tension in two-person cells causing damage to prison security, discipline, or order. The CDC instead relied on generalized accounts of racial conflict in certain prisons (not prisons in which Johnson has resided), without specific discussion of any relation between housing assignments and the outbreak of violence.

The CDC contends that the confined nature of cells makes them different from non-segregated facilities within CDC prisons. *Id.* at 4a. Because they have been largely unsuccessful in preventing the existing level of racial violence in areas where staff can easily observe the inmates, CDC administrators worry that they would be unable to protect inmates in their cells from the violence they believe would likely arise from interracial assignments. *Id.* The CDC argues that each prison routinely needs a 60-day period of racial segregation to determine whether a newly arrived inmate poses a danger to others. *Id.* After 60 days, the inmate is assigned a cell or transferred to another institution, where, during its reevaluation, the CDC will continue to racially segregate him for another 60 days. *Id.* at 4a-5a.

B. Proceedings in the District Court

After having been racially segregated numerous times, Johnson filed a complaint, in pro per, in federal district court alleging that the CDC's policy violated his constitutional rights. On January 8, 1998, the district court dismissed the Third Amended Complaint without leave to amend and

Johnson appealed. The court of appeals reversed in part the district court's dismissal on March 21, 2000, and remanded, holding that Johnson's allegations were sufficient to state a claim for racial discrimination in violation of the Fourteenth Amendment. *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000) (relying on *Lee v. Washington* and citing *Turner v. Safley*).

On remand, the district court appointed counsel for Johnson and granted leave to file a Fourth Amended Complaint, in which Johnson sought monetary damages and injunctive relief. Discovery was conducted and all parties sought summary judgment on the equal protection claims. On June 11, 2001, the district court denied the summary judgment motions, as well as the CDC administrators' motion for summary judgment based on qualified immunity. After the Supreme Court decided *Saucier v. Katz*, 533 U.S. 194 (2001), however, respondents Rowland and Gomez successfully moved for reconsideration of the denial of their motion for summary judgment based on qualified immunity. On July 30, 2001, the district court granted this motion, holding that under *Saucier* the former administrators were entitled to qualified immunity because their actions were not clearly unconstitutional. Pet. App. at 34a-35a.

C. Proceedings in the Ninth Circuit

The Ninth Circuit Court of Appeals affirmed the district court, holding that the segregation policies were entitled to a presumption of constitutionality and that Johnson had not rebutted that presumption. *Id.* at 31a.

The court recognized that under *Lee v. Washington*, racial segregation in prisons violates equal protection, except when

prison authorities, acting in good faith, find segregation necessary in particularized circumstances to maintain security, discipline, and order. *Id.* at 8a-9a. The court discounted decisions from sister circuits[1] applying *Lee* to invalidate segregationist prison policies, reasoning that in those cases — which it characterized as featuring more invidious and pervasive racial segregation — "the standard of the court's review probably did not matter." *Id.* at 11a. By contrast, the panel saw this case as a close one requiring determination of the applicable standard of scrutiny. *Id.*

The court applied *Turner's* "relaxed standard" to Johnson's racial equal protection claim, rather than the strict scrutiny evidently applied in *Lee*, based on its understanding that the *Turner* standard applied to determine the constitutionality of *all* prison regulations, *including* those involving racial segregation.[2] *Id.* at 11a-13a. The court also relied on *Washington v. Harper*, 494 U.S. 210, 224 (1990), in which this Court, considering a substantive due process claim related to forced administration of anti-psychotic drugs, described the *Turner* standard as applicable when the needs

1. The court discounted *United States v. Wyandotte County*, 480 F.2d 969, 971 (10th Cir. 1973), *cert. denied*, 414 U.S. 1068 (1973), in which the Tenth Circuit held that an unsubstantiated fear of racial violence does not provide authority to segregate inmates on the basis of race into separate tanks or cell blocks. Pet. App. at 10a-11a. The court similarly discounted the Fifth Circuit's ruling, in *Sockwell v. Phelps*, 20 F.3d 187, 191-92 (5th Cir. 1994), that permanent segregation of cell mates based on race violated the Equal Protection Clause. Pet. App. at 10a-11a.

2. The court conceded, however, that *Turner* is not in fact applied to determine the constitutionality of all prison regulations. As the court noted, the Ninth Circuit has refused to apply *Turner* in the Eighth Amendment context. Pet. App. at 12a n.6.

of prison administration implicate constitutional rights. Pet. App. at 12a.

Johnson petitioned unsuccessfully for rehearing with a suggestion for rehearing en banc. Four judges dissented from the denial of rehearing. *Id.* at 38a. For the dissenters, Judge Ferguson observed that this Court has not overruled *Lee*, and distinguished *Turner* because it was not a case involving racial segregation:

> [G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.

Id. at 41a n.1 (alteration in original) (quoting *Cohens v. Virginia*, 19 U.S. 264, 399 (1821)). Judge Ferguson also noted that "[b]oth the Fifth and Seventh Circuits have refused to accord such extreme deference [to racial segregation by prisons], recognizing that, in the context of race, more must be required." Pet. App. at 44a. The dissenting judges found *Lee* controlling, especially in light of this Court's recent and repeated command that lower courts apply strict scrutiny to all race-based classifications. *Id.* at 39a-40a, 42a. Opining that the panel had effectively overruled *Lee*, the dissenters maintained that the panel was not free to apply *Turner* rather than *Lee*:

> [T]he panel simply does not have the authority to interpret *Turner* as requiring a different level of review. "If a precedent of th[e Supreme] Court had direct application in a case, yet appears to rest

> on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions."

Id. at 41a (Ferguson, J., dissenting) (alteration in original) (quoting *Rodriguez de Ouijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989)).

Unlike the panel, the dissenters concluded that *Turner* did not supply the standard applicable to a state's practice of intentional racial segregation in the prison setting. Taking issue with the panel's analysis that Johnson has "a 'reasonable alternative' to exercise his right to be free from discrimination because he is not subject to segregation during meals and recreational time," Judge Ferguson pointed out that "the panel essentially asserts that if the state only discriminates sometimes, no harm is done." Pet. App. at 45a-46a (Ferguson, J., dissenting) (quoting *Johnson v. California*, 321 F.3d 791, 804 (9th Cir. 2003)).

REASONS FOR GRANTING THE PETITION

Johnson respectfully requests that this Court grant the petition, and either summarily reverse or set this case for briefing and argument.

This case raises important, recurring questions relating to the scope of the Equal Protection Clause's prohibition of state-imposed racial segregation. The decision below is in direct conflict with decisions of this Court and two circuit courts. More specifically, the decision below conflicts with: (a) the Court's decision in *Lee v. Washington*, holding that the Equal Protection Clause bars racial segregation in prisons,

except where found necessary in particularized circumstances to maintain security, discipline, and order; (b) the Court's decisions in *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995); *Grutter v. Bollinger*, 123 S. Ct. 2325 (2003); and *Gratz v. Bollinger*, 123 S. Ct. 2411 (2003), holding that all intentional state racial segregation is subject to strict scrutiny when challenged under the Fourteenth Amendment; (c) decisions from the Fifth and Seventh Circuits, holding that intentional state racial segregation in prisons always requires strict scrutiny; and (d) decisions from the District of Columbia and Eighth Circuits, holding that prison regulations that discriminate based on suspect classifications require heightened scrutiny. Moreover, the Ninth Circuit's extension of the relaxed standard of review employed in *Turner v. Safley* to claims of racial segregation raises an important issue that was either settled by this Court in *Lee*, or should be settled now. Permitting the Ninth Circuit's decision to stand would excuse state prison officials from having to justify their intentional racial segregation under strict judicial scrutiny, notwithstanding that intentional state racial segregation has been outlawed in this country for over half a century.

I. The Ninth Circuit's Decision Conflicts with This Court's Decisions Subjecting All Government Racial Classifications, Including Those in Prisons, to Strict Scrutiny

The standard of review applied by the Ninth Circuit conflicts with the Court's applicable precedents. The Court has repeatedly and definitively held that all governmental racial classifications are subject to strict scrutiny. This unwavering standard of scrutiny was reaffirmed last term

in *Grutter*, 123 S. Ct. 2325, and *Gratz*, 123 S. Ct. 2411, and has applied to state actors since 1989, when the Court decided *Croson*, 488 U.S. 469; *accord Adarand*, 515 U.S. 200. The Court has been unambiguous on this issue: "*[A]ll* racial classifications imposed by government 'must be analyzed by a reviewing court under strict scrutiny.' This means that such classifications are constitutional only if they are narrowly tailored to further compelling governmental interests." *Grutter*, 123 S. Ct. at 2337-38 (quoting *Adarand*, 515 U.S. at 227) (emphasis added); *accord Gratz*, 123 S. Ct. at 2427 ("It is by now well established that 'all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized.' ") (quoting *Adarand*, 515 U.S. at 224). The Court applies "strict scrutiny to all racial classifications to 'smoke out illegitimate uses of race by assuring that [government] is pursuing a goal important enough to warrant use of a highly suspect tool.' " *Grutter*, 123 S. Ct. at 2338 (alteration in original) (quoting *Croson*, 488 U.S. at 493).

This Court has also made clear that strict scrutiny applies to racial segregation practiced by state prison authorities. This was established in the Court's opinions in *Lee v. Washington*, by the Fifth Circuit decision summarily affirmed in *Lee*, and by subsequent reference to *Lee* by this Court and its members.

The holding in *Lee* was that racial segregation in prison violates the Equal Protection Clause. Nothing in the decision reflects any different standard than that applied in *Brown v. Board of Education*, 347 U.S. 483 (1954), and its progeny. The Court noted the state's objection that "the specific orders directing desegregation of prisons and jails make no allowance for the necessities of prison security and discipline," but stated that it did not read the district court's

order to bar consideration of those factors in implementing a remedy. *Lee*, 390 U.S. at 333-34. Similarly, the concurrence of Justices Black, Harlan, and Stewart cautioned the states that the reference to those considerations should not be taken "as evincing any dilution of this Court's firm commitment to the Fourteenth Amendment's prohibition of racial discrimination." *Id.* at 334. The decision of the three-judge court summarily affirmed in the brief decision was itself squarely based on the principle of strict scrutiny reflected in "*Brown v. Board of Education* and the numerous cases implementing that decision, [namely that] racial discrimination by governmental authorities in the use of public facilities cannot be tolerated." *Washington v. Lee*, 263 F. Supp. 327, 331 (M.D. Ala. 1966), *aff'd*, 390 U.S. 333 (1968) (citations omitted).

This Court's repeated citation to *Lee* demonstrates the case's continued vitality and plainly reflects that strict scrutiny, not any lesser standard, was applied. The Court cited *Lee* in *Hudson v. Palmer*, for example, for the holding "that invidious racial discrimination is as intolerable within a prison as outside, except as may be *essential* to 'prison security and discipline.' " 468 U.S. 517, 523 (1984) (quoting *Lee*, 390 U.S. at 334) (emphasis added). More recently, Justice Scalia specifically noted that *Lee's* "necessities" exception is applicable "only [in] a social emergency rising to the level of imminent danger to life and limb . . . [such as] a prison race riot." *Croson*, 488 U.S. at 521 (Scalia, J., concurring). Last term, Justice Thomas cited *Lee* as "indicating that protecting prisoners from violence *might* justify narrowly tailored racial discrimination." *Grutter*, 123 S. Ct. at 2352 (Thomas, J., dissenting) (emphasis added).

The more relaxed level of judicial scrutiny held applicable to different claims by prisoners, which the Ninth Circuit panel applied (and indicated was outcome-determinative here), was not formulated in a case involving racial segregation. In *Turner v. Safley*, the Court fashioned a standard of review for prisoner's constitutional claims that would accommodate a policy of judicial restraint necessitated by the special problems of prison management. *Turner*, 482 U.S. at 85. Reviewing prison rules that were claimed to violate prisoners' rights of expression and the right to marry, the *Turner* Court determined that a lower level of scrutiny was appropriate. Although these claims implicated important constitutional rights, the Court in *Turner* was not called upon to consider issues or cases related to equal protection, let alone race or other suspect classifications historically accorded heightened scrutiny under the Court's equal protection jurisprudence.

In *Turner*, the Court held that the proper standard for determining the validity of the First Amendment and due process claims then before it was to ask whether the regulation is "reasonably related to legitimate penological interests." *Id.* at 89. Thus, to evaluate whether those prison regulations could withstand scrutiny under the First Amendment and the Due Process Clause of the Fourteenth Amendment, the Court first applied a test comparable to rational basis review. *See, e.g., Harper*, 494 U.S. at 224-25 (describing the *Turner* test as requiring "rational" connection between the prison regulation and government interest put forward to justify it); *Pargo v. Elliott*, 49 F.3d 1355, 1356 (8th Cir. 1995) (same).

The Ninth Circuit's decision extends *Turner's* relaxed standard of review to prisoners' race-based equal protection

claims. If strict scrutiny applies to determine the constitutionality of well-intentioned policies such as affirmative action in higher education, *see Grutter* and *Gratz*, this Court's cases should not be construed as abandoning that standard when the challenged decision involves segregation of African-American prisoners, especially given the history of stigma and racial discrimination that such segregation calls to mind. As this Court has repeatedly held, equal protection demands strict scrutiny because racial classifications have the potential to cause severe societal harm. *Adarand*, 515 U.S. at 236. Racial classifications — let alone racial segregation — must be demonstrated to be "unquestionably legitimate" to counter their "pernicious" effects. *Id.*

II. The Decision Below Conflicts with Holdings of Four Other Circuit Courts That Prison Regulations Based on Suspect Classifications Require Heightened Scrutiny

Four courts of appeal — the Fifth, Seventh, Eighth, and District of Columbia Circuits — have held that the strict scrutiny prescribed by this Court's equal protection jurisprudence applies to governmental racial (or gender) discrimination in jails and prisons. *See, e.g., Sockwell v. Phelps*, 20 F.3d 187, 191 (5th Cir. 1994) (applying heightened scrutiny to a policy of segregating two-person cells based on race; racial segregation of offending individual prisoners would require prison officials to make "an individualized analysis" that such action was "needed to stifle particular instances of racial violence"); *Black v. Lane*, 824 F.2d 561, 562 (7th Cir. 1987) (applying strict scrutiny in a case of racial segregation of prisoners, holding that "absent a compelling state interest, racial discrimination in administering prisons

violates the Equal Protection Clause");[3] *Pitts v. Thornburgh*, 866 F.2d 1450, 1453 (D.C. Cir. 1989) (heightened scrutiny applies, notwithstanding *Turner*, in cases involving gender-based discrimination by prison officials, citing *Lee v. Washington*); and *Pargo*, 49 F.3d at 1356-57 (8th Cir. 1995) ("Not all reviews of prison policies or practices require judicial deference. . . ."; holding that the district court erred in applying *Turner's* relaxed scrutiny, instead of the heightened scrutiny traditionally accorded gender-based equal protection claims).[4]

By contrast, two circuit courts of appeals — the Ninth Circuit in this case and the Fourth Circuit — apply the rational basis standard of *Turner*. *See Morrison v. Garraghty*, 239 F.3d 648, 654-66 (4th Cir. 2001) ("This more deferential standard applies even when the alleged infringed constitutional right would otherwise warrant higher scrutiny, such as when an inmate claims that his constitutional right to equal protection of the laws has been violated by the prison's implementation of a racial classification.") (citations omitted).

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3. The Seventh Circuit decided *Black v. Lane* 12 days after the Supreme Court decided *Turner v. Safley*, and the precedent continues to bind courts in that circuit. *See, e.g., Wilson v. Schomig*, 863 F. Supp. 789, 793 (N.D. Ill. 1994) (citing *Black v. Lane* in context of prison racial equal protection claim).

4. Consistent with *Pargo*, district courts within the Eighth Circuit have held that strict scrutiny applies to prison racial classifications. *See Mason v. Schriro*, 45 F. Supp. 2d 709, 714 (W.D. Mo. 1999) (strict scrutiny applied to examine claim that prison officials used race as a primary factor for making housing assignments); *accord Betts v. McCaughtry*, 827 F. Supp. 1400, 1404 (W.D. Wis. 1993) ("Racial discrimination in the administration of prisons violates the [E]qual [P]rotection [C]lause, unless it is justified by a compelling state interest.") (citing *Black v. Lane*, 824 F.2d at 562).

Other circuit courts have refrained from deciding whether heightened scrutiny should apply to suspect-class equal protection claims in the prison setting, though some district courts within those circuits have considered the issue. The Sixth Circuit has expressly reserved judgment on the issue, *Glover v. Johnson*, 198 F.3d 557, 561 (6th Cir. 1999) (declining to decide what standard of review applied to prisoners' gender-based equal protection claims because the law of the case and fact-finding below obviated the need to do so), although a district court in that circuit has held that the Equal Protection Clause prohibits discrimination in prisons based on race absent a compelling state interest. *Nedea v. Voinovich*, 994 F. Supp. 910, 916 (N.D. Ohio 1998) (confirming strict scrutiny would apply to an inmate's claim of racially motivated parole denial). Similarly, the Third Circuit has not yet opined on the issue, but a district court in that circuit reached the question, following the rule of *Turner* rather than *Lee*. *Simpson v. Horn*, 25 F. Supp. 2d 563, 572-73 (E.D. Pa. 1998).

Without resolution of this conflict by this Court, lower courts will continue to apply inconsistent standards in adjudicating race-based constitutional claims brought by prisoners.

III. The Issue Presented Is Recurring and of Exceptional Importance

Resolving the proper standard of review for examining segregationist prison policies is essential because of the far-reaching impact of state-sponsored discrimination. Over one hundred thousand California inmates are subject to admittedly segregationist government policies. Under the ruling of the court below, and in spite of this Court's

longstanding insistence that *all* intentional governmental racial segregation be strictly scrutinized, such policies and practices will escape appropriate judicial review in both the Ninth and Fourth Circuits.

The decision below undermines a national imperative to eliminate racial discrimination.[5] The very fact of California's official racial classification is offensive to the Fourteenth Amendment, a "core purpose" of which "was to do away with all governmentally imposed discrimination based on race." *Grutter*, 123 S. Ct. at 2346 (quoting *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984)). Furthermore, "[e]nshrining a permanent justification for racial [discrimination] would offend this fundamental equal protection principle." *Grutter*, 123 S. Ct. at 2346. In the face of this significant national goal, the Ninth Circuit's ruling permits the CDC's policy of routine racial segregation to continue without requiring the policy to be either narrowly tailored or to be in direct response to any extraordinary circumstance involving prison security, as required by *Lee*.

As this Court again recognized last term, the Equal Protection Clause prohibits the state from employing policies that look only at skin color and that fail to afford any individualized consideration to persons in recognition that they likely have relevant qualities other than skin color. *See Gratz*, 123 S. Ct. at 2428. It would be incongruous permit the CDC to dispense with the same individualized consideration in prison housing. Certainly strict scrutiny

5. *See, e.g.*, International Convention on the Elimination of All Forms of Racial Discrimination, *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969; *entered into force for the United States* November 20, 1994).

should be required when state actors, in any context, replace individualized treatment with gross racial stereotyping.

The application of a lesser standard of review to prison-based claims of race discrimination not only subverts the Court's jurisprudence; it does so unnecessarily. Since *Lee v. Washington*, prison authorities have had "the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." 390 U.S. at 334 (concurrence). While running a prison is inordinately difficult and requires expertise, *Turner*, 482 U.S. at 85, the judiciary is uniquely able to review governmental policies of racial classification. *Croson*, 488 U. S. at 493; *Grutter*, 123 S. Ct. at 2338. Hence, it is for the judiciary to use strict scrutiny to " 'smoke out' illegitimate uses of race." *Grutter*, 123 S. Ct. at 2338 (quoting *Croson*, 488 U.S. at 493).

Strict scrutiny would not prohibit prison officials from acting where "a social emergency rising to the level of imminent danger to life and limb — for example, a prison race riot, requiring temporary segregation of inmates . . . can justify an exception to the principle embodied in the Fourteenth Amendment that '[o]ur Constitution is colorblind, and neither knows nor tolerates classes among citizens.' " *Croson*, 488 U.S. at 520 (Scalia, J., concurring) (alteration in original) (quoting *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting)). Strict scrutiny is not "strict in theory, but fatal in fact." *Adarand*, 515 U.S. at 35; *see, e.g., Korematsu v. United States*, 323 U.S. 214 (1944); *Grutter*, 123 S. Ct. 2325. If prison policies of racial segregation are required to be narrowly tailored by a compelling government interest, this will not prevent prison authorities from instituting such policies when necessary.

There is no reason, in the prison context or any other context, to dilute the standard of review consistently applied by this Court to government policies of racial segregation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the Supreme Court grant a writ of certiorari, and either summarily reverse or set the case for full briefing and oral argument.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 25, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-56436

GARRISON S. JOHNSON,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; JAMES H. GOMEZ, Director, Department of Corrections; JAMES ROWLAND,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
Consuelo B. Marshall, Chief Judge, Presiding

Argued and Submitted
October 10, 2002—Pasadena, California

Filed February 25, 2003

Before: Procter Hug, Jr., Melvin Brunetti and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge O'Scannlain

Appendix A

OPINION

O'SCANNLAIN, Circuit Judge.

We must decide whether a prison reception center housing policy, which uses race as one factor in assigning a new inmate's initial cell mate for 60 days, violates the Equal Protection Clause.

I

Garrison Johnson is an African-American prisoner in the California Department of Corrections ("CDC"), serving his sentence for murder, robbery, and assault with a deadly weapon. On June 22, 1987, he was received at the California Institution for Men in Chino, California, and since that time has been transferred to a number of different facilities within the CDC. He has been through the inmate reception centers at Chino, Folsom, Calipatria, and is currently incarcerated at Lancaster. At each facility he was double-celled with another African-American inmate.

According to the staff testimony in the record, when an inmate arrives at a CDC institution either as a transfer from another facility or as a new inmate, he[1] is initially housed in a reception center. At the reception center, the inmate goes through a classification process. The CDC evaluates the inmate's physical, mental, and emotional health. The inmate must also provide vocational and educational goals that he wants to accomplish while incarcerated. Finally, the inmate

1. The complaint does not raise the question of female housing policies and the only plaintiff is male.

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is given a battery of tests. In making its decision, the CDC reviews the inmate's history in jail and any previous commitments to determine his security needs and classification level. The CDC also looks to see if the inmate has any enemies in the prison, such as people who testified against him in the past or in his criminal case, co-defendants, or inmates with whom he may have had disputes during previous incarcerations.

To determine the double-cell housing placement at the reception center, the CDC looks at several factors including, but not limited to, gender, age, classification score, case concerns, custody concerns, mental and physical health, enemy situations, gang affiliation, background, history, custody designation, and race. Although race is only one of many factors, it is a dominant factor; according to the CDC, the chances of an inmate being assigned a cell mate of another race is "[p]retty close" to zero percent. The CDC considers race when making an initial housing assignment because, in its experience, race is very important to inmates and it plays a significant role in antisocial behavior.

Generally, inmates are listed in four general ethnic categories, black, white, Asian, and other. Within each of these categories, officials at the reception center further divide inmates, for example Japanese and Chinese inmates are generally not housed together, nor are Laotians, Vietnamese, Cambodians, and Filipinos. Also, Hispanics from Northern California and Hispanics from Southern California are not housed together because, in the administrators' experience, they tend to be at odds with one another.

Linda Schulteis, the Associate Warden at California State Prison-Lancaster, testified that if race were not considered in making this initial housing assignment, she is certain that there would be racially based conflict in the cells and in the yard. She stated, "I am therefore not willing to knowingly disregard the factors and place an inmate into jeopardy and would not compromise an inmate [*sic*] or group of inmates [*sic*] safety by taking steps that I know would result in violence and conflict." This view is unanimously seconded by other prison officials.

Although the rest of the prison is fully integrated—there is no distinction based on race as to jobs, meals, yard and recreation time, and vocational and educational assignments—according to the administrators, the confined nature of the cells makes them different from the other areas of the prison. Staff cannot see into the cells without going up to them, and inmates are capable of placing coverings over the windows so that staff cannot see in them at all. Moreover, inmates are confined to their cells for much of their day. Because of the current levels of racial violence occurring in areas where the staff can easily observe the inmates, the administrators are concerned that they would not be able to protect inmates who are confined in their cells. Thus, the administrators argue that they need 60 days to analyze each inmate on an individual basis to determine whether the inmate poses a danger to others.

After 60 days, the inmate either is assigned a cell within the current institution where he will be permanently housed or is transferred to another institution where his classification indicates that he would be more suited. If the inmate is

transferred, he again goes through the initial housing screening process. If the inmate stays at the institution and has the appropriate security classification, he may be transferred to a dormitory or a single cell.

Inmates assigned to a dormitory are considered nonviolent, and, thus, inmates of all races are housed together. The CDC does not use race as a factor to determine who is assigned to a dormitory, but within each dormitory it attempts to maintain a racial balance so as to reduce the likelihood of racial violence. Single-cell housing decisions are made completely independent from race. Johnson does not allege that either of these two housing policies violate equal protection.

If the inmate remains in a double cell, the CDC's goal is for inmates to select their own cell mate, so as to maximize the inmates' compatibility and to reduce the possibility of violence. There are designated forms that both inmates must sign indicating that they would like to share a cell together. Unless there are security reasons for not granting an inmate's request to share a cell with another inmate, the CDC will usually grant these requests. Race is not a consideration in such decisions.

II

On February 24, 1995, Johnson as a pro se plaintiff filed his original complaint, alleging that the CDC's reception center housing policy violated his constitutional rights by assigning inmates' cell mates on the basis of race. In January 1998, the district court dismissed Johnson's Third Amended

Complaint without leave and Johnson appealed. We reversed the district court's dismissal in part on March 21, 2000 and remanded, holding that Johnson's allegations were "sufficient to state a claim for racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." *Johnson v. California*, 207 F.3d 650, 655 (9th Cir. 2000).

On remand, Johnson was appointed counsel and granted leave to amend his complaint. He filed his Fourth Amended Complaint on July 5, 2000, seeking monetary damages. He alleged that James Gomez and James Rowland, former CDC Directors, in their individual capacities violated his constitutional rights by formulating and implementing the CDC housing policy. He also sought injunctive relief against Stephen Cambra, the current CDC director. Discovery was conducted, and both parties moved for summary judgment on the equal protection claims. Both were denied. The district court denied the administrators' summary judgment motion because the court concluded that there was a question of material fact regarding what happens to double-celled inmates following the 60 days in the initial reception center.[2]

The district court also denied the administrators' qualified immunity-based motion for summary judgment. After the Supreme Court issued its decision in *Saucier v.*

2. The parties to this appeal, however, no longer contend that the aftermath of the 60-day policy is relevant; Johnson's counsel at oral argument explicitly disavowed any challenge to the continuing effects of the CDC's housing policy and limited the challenge only to the 60-day policy itself. Thus, the only question before this court is whether the CDC's use of race to make the temporary 60-day housing decision violates the Equal Protection Clause.

Katz, 533 U.S. 194 (2001), however, Rowland and Gomez successfully moved for reconsideration of the denial of summary judgment. This time, the district court granted the motion, holding that under *Saucier* the former administrators were entitled to qualified immunity because their actions were not clearly unconstitutional. Johnson now appeals from the district court's grant of summary judgment for the administrators.

III

The Supreme Court in *Saucier v. Katz*, 533 U.S. 194 (2001), instructed that before we can determine whether state officials are entitled to qualified immunity, we must first address the merits of the alleged constitutional violation. The first question we must ask is whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the [officials'] conduct violated a constitutional right?" 533 U.S. at 201. If we answer this question in the negative, then the inquiry is over and the case should be dismissed: we never reach the issue of qualified immunity. It is only when "a violation could be made out on a favorable view of the parties' submissions" that a court evaluating a claim of qualified immunity should proceed to "the next, sequential step [of] ask[ing] whether the right was clearly established." *Id.* Thus, in accordance with *Saucier*, we first turn to the merits of the case.[3]

3. Although a question of material fact did exist when the district court considered the case, precluding summary judgment on the merits, Johnson conceded that he is not challenging this question of fact anymore. As such, we must first address the merits of Johnson's claim. *Saucier*, 533 U.S. at 201.

Appendix A

A

Johnson alleges that the state's use of race in making initial housing assignments constitutes an impermissible racial classification afoul of the Equal Protection Clause.[4] The Equal Protection Clause provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The central mandate of this Clause "is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995); *see also Shaw v. Hunt*, 517 U.S. 899, 907 (1996) ("Racial classifications are antithetical to the Fourteenth Amendment, whose central purpose was to eliminate racial discrimination emanating from official sources in the States." (citation and internal quotations omitted)). Ultimately the Equal Protection Clause strives "to do away with all governmentally imposed discrimination based on race," *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (citation and footnote omitted), because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality," *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943).

The goal of eradicating invidious race discrimination is no less laudable in the prison context. In *Lee v. Washington*,

4. The state admits considering race when it assigns inmates their cell mate. Thus, the policy is suspect on its face, and Johnson need not prove a discriminatory intent or impact. *See Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 289 n.27 (1978); *see also Hunter v. Erickson*, 393 U.S. 385, 389 (1969); *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967).

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390 U.S. 333 (1968), the Supreme Court tackled the issue of racial segregation in prisons. In a per curiam opinion, the Court held that an Alabama state statute requiring segregated cell blocks in jails and prisons violated the Equal Protection Clause of the Fourteenth Amendment. 390 U.S. at 333. *Lee*, however, also recognized that prisons present an inherently different situation than society at large. A three justice concurrence explicitly noted what the per curiam opinion implicitly recognized, that "prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." *Id.* at 334. The *Lee* majority has since been interpreted as holding racial discrimination within prisons unconstitutional, save for "the necessities of prison security and discipline." *See, e.g., Cruz v. Beto*, 405 U.S. 319, 321 (1972). Thus, while recognizing the important need to combat racial discrimination, even in prisons, the Court also recognized that the very nature of prisons may require the use of race-based criteria in official decisionmaking under limited circumstances.

Johnson does not dispute that *Lee* acknowledges that under some circumstances race may be considered in prison decisionmaking, but denies that this is one such instance. The "particularized circumstances" or "necessities of prison security and discipline" under which racial discrimination is permissible have never been defined by the Supreme Court or this court, and the meaning of these terms is not axiomatic. To make his argument, Johnson cites cases from our sister circuits that have addressed this issue and have held that an unsubstantiated fear of racial violence or a desire to protect

individuals against racial insensitivity does not provide the authority to segregate inmates on the basis of their race into separate tanks or cell blocks, *see, e.g., United States v. Wyandotte County*, 480 F.2d 969, 971 (10th Cir. 1973) (holding assignment of inmates to East or West tanks by race unconstitutional); *McClelland v. Sigler*, 456 F.2d 1266 (8th Cir. 1972) (holding segregated prison wing unconstitutional), or to 2507 assign inmates permanent cell mates solely on the basis of race, *see, e.g., Sockwell v. Phelps*, 20 F.3d 187 (5th Cir. 1994). These cases, however, while helpful to understand what is clearly unconstitutional, do little to define the contours of "particularized circumstances" or "necessities of prison security and discipline" in the case at hand.[5]

5. Unlike *Lee*, *Wyandotte County*, and *McClelland*, where the prison officials segregated the prison into black and white cell blocks or tanks under the guise of promoting racial harmony, the CDC is integrated in full. Inmates of all races work together, eat together, and use the yard together. This case simply does not involve a similarly broad segregation policy. Moreover, unlike the permanent policies in place in all of the aforementioned cases, this is a temporary arrangement, lasting only 60 days, which, according to the CDC, permits it to learn more about the inmates before assigning them to a cell on a more permanent basis. The Tenth Circuit recognized this distinction in *Wyandotte County*. In deciphering the meaning of "particularized circumstances," the Tenth Circuit stated that *Lee* did "no more than recogniz[e] the commonly accepted principle that in the administration of prison affairs there may arise unusual situations in which security and discipline demand segregation for limited periods." *Wyandotte County*, 480 F.2d at 971 (footnote omitted). In this case, to run a safe prison system, the CDC contends that it must assign cell mates, partly based on the inmates' race, for 60 days so that it can find out more about the inmate and reduce violence within the prison system. The policy is limited to the dangers it seeks to alleviate.

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Given the invidious and pervasive nature of the segregation at issue in *Lee*, *Wyandotte County*, *McClelland*, and *Sockwell*, the standard of the court's review probably did not matter; in a close case such as the one at hand, however, the standard of review is paramount. In 1987, in recognition of the unique circumstances that prisons present, the Supreme Court promulgated a new deferential test for examining the constitutional rights of prisoners, *Turner v. Safley*, 482 U.S. 78, 89 (1987), a test that had not been applied in any of the cases Johnson relies upon.

B

In *Turner*, the Court held that although prisoners do not check their constitutional rights at the prison gates, *see Wolff v. McDonnell*, 418 U.S. 539, 555-56 (1974) ("There is no iron curtain drawn between the Constitution and the prisons of this country."), a relaxed standard is used in determining

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Paramount, in this case, there is also no indication that the use of race in the CDC's decisionmaking disparately affects the inmates. In *Sockwell*, "white cells" received preferential treatment to "black cells"—"white two-man cells were called to showers and to sell plasma first, enjoyed better telephone and store privileges, and had a better view of the televisions," 20 F.3d at 190—and black inmates were deprived of privileges, such as work and plasma donation, while waiting for another black two-man cell to have an opening, *id.*; *see also McClelland*, 456 F.2d at 1267 (white cell blocks had better living conditions than black cell blocks). Similar disparate treatment is not present in this case: there are no allegations that African-American inmates receive unfavorable cell locations or disparate treatment as compared to their white or Hispanic counterparts. This is not a situation where prison administrators are rewarding inmates for their "intransigent racial attitudes." *McClelland*, 456 F.2d at 1267.

the constitutionality of all prison regulations.[6] *See, e.g., Shaw v. Murphy*, 532 U.S. 223, 229 (2001) ("[I]n *Turner* we adopted a *unitary*, deferential standard for reviewing prisoners' constitutional claims. . . ." (emphasis added)); *Washington v. Harper*, 494 U.S. 210, 224 (1990) ("We made quite clear that the standard of review we adopted in *Turner* applies to all circumstances in which the needs of prison administration implicate constitutional rights."); *Morrison v. Garraghty*, 239 F.3d 648, 654-55 (4th Cir. 2001) (holding more deferential standard of *Turner* applies to equal protection claims within prisons). *Turner* recognized that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," and that "the problems of prisons in America are complex and intractable, and, more to the point, they are not readily susceptible of resolution by decree." 482 U.S. at 84 (citation and internal quotations omitted). According to the Court, "[s]ubjecting day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Id.* at 89. Thus, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." *Id.* at 89.

6. Although we refused to apply *Turner* in the Eighth Amendment context, we held that *Turner* is appropriate "where the constitutional right is one which is enjoyed by all persons, but the exercise of which may necessarily be limited due to the unique circumstances of imprisonment." *Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993) (en banc). Equal protection concerns come within *Turner*. *See id.* (citing *Griffin v. Coughlin*, 743 F. Supp. 1006, 1010-19 (N.D.N.Y. 1990) (applying *Turner* to equal protection claim but not to Eighth Amendment claim)).

Turner was not merely a cosmetic change in the Court's language. *Turner* ostensibly expanded the definition of "particularized circumstances" and "necessary for security and discipline," and lowered the prison administrators' burden to justify race-based policies. Under *Turner*, rather than the administrators bearing the burden of proving their housing policy constitutional, the inmate bears this "heavy burden": "To prevail, [Johnson] must overcome the presumption that the prison officials acted within their 'broad discretion.' " *Shaw*, 532 U.S. at 232. Thus, to the extent, if any, that *Turner*'s "reasonably related" standard and *Lee*'s "particularized circumstances" inquiry point to divergent paths, we are bound to follow *Turner*. With *Turner* as our guide, we now consider whether the administrators' temporary housing policy is reasonably related to their concern for increased racial violence.

IV

In *Turner*, the Court provided four factors to examine in determining whether the prison administrators' actions are reasonably related to a legitimate penological interest. First, a " 'valid, rational connection' [must exist] between the prison regulation and the legitimate governmental interest put forward to justify it." *Turner*, 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)). Second, we must determine "alternative means of exercising the right that remain open to prison inmates." *Id.* Third, we must assess "the impact accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Id.* Fourth, we must determine whether "ready alternatives" to the CDC's policy are available. *Id.* The "existence of obvious, easy alternatives may be evidence that the regulation is not reasonable." *Id.*

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A

The first factor we must consider is whether there is a "valid, rational connection" between the policy and a legitimate government interest. "This requires us to determine whether the governmental objective underlying the policy is (1) legitimate, (2) neutral, and (3) whether the policy is 'rationally related to that objective.' " *Mauro v. Arpaio*, 188 F.3d 1054, 1059 (9th Cir. 1999) (en banc) (quoting *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989)).

The prison administrators assert that their race-based housing policy protects the safety of inmates and staff pursuant to the first *Turner* factor. This is undoubtedly a legitimate penological interest. *Mauro*, 188 F.3d at 1059 ("[T]here is no doubt that protecting the safety of guards in general is a legitimate interest.").

The government objective must also be neutral. In this context, neutrality means that the government objective must be unrelated to racial discrimination. *Cf. id.* at 1059. Although the CDC uses race to make its temporary housing assignments, the housing policy does not provide any advantage or disadvantage to any particular race,[7] and the objective, reducing violence among the inmates and against

7. If, for example, whites were treated more favorably in cell locations or privileges than blacks as they were in *Sockwell*, 20 F.3d at 190, the policy could not be sustained as neutral and the policy would likely be struck down under *Turner*. *See Morrison*, 239 F.3d at 656 ("The perniciousness of a race-based classification is not lessened simply because we afford more leeway to prison officials in the operation of their facilities. . . .").

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the staff, has nothing to do with race, but rather with inmate and staff safety. Because the prison administrators use race as a factor in making their initial housing assignments, "solely on the basis of [its] potential implications for prison security," the policy is considered neutral in the manner that *Turner* used that term. *Thornburgh v. Abbott*, 490 U.S. 401, 415 (1989) ("Where . . . prison administrators draw distinctions between publications solely on the basis of their potential implications for prison security, [as opposed to reasons related to the 'suppression of expression,'] the regulations are 'neutral' in the technical sense in which we meant and used that term in *Turner*."); *Mauro*, 188 F.3d at 1059.

Finally, we must determine whether a prison regulation is rationally related to the state's interest. According to Johnson, before the state's use of race as a factor in its decisionmaking can so qualify, *Lee* requires that it must first have an instance, specific to cell assignments, to which it can point to prove the necessity of such a policy. For example in *White v. Morris*, 832 F. Supp. 1129, 1130 (S.D. Ohio 1993), the court allowed double cells segregated strictly along racial lines only after ten people, nine inmates and one corrections officer, were murdered during an eleven-day racial riot, and the integrated double-celling was cited as a primary factor in the riot. 832 F. Supp. at 1130.

Under Johnson's view, the same violence would have to occur within the CDC in order to permit race to be considered as a factor in making initial housing decisions. We disagree.[8]

8. Although we decline to decide if indeed Johnson is correct that *Lee* would have required actual violence arising out of double-

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While the administrators simply cannot make "[r]outine and automatic arguments" that protecting the "constitutional rights of prisoners will lead to a breakdown in institutional discipline and security,"[9] *Cleavinger-v. Saxner*, 474 U.S. 193,

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celling specifically, Johnson's argument cannot withstand our consistent application of *Turner*. *See, e.g., Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993).

9. In this case, the administrators' reasoning is not an automatic response. The high level of racial violence in the CDC is well documented, and the administrators are well within their discretion to attempt to rectify or to reduce further violence by taking reasonable measures.

As one example, B. O'Neil, Associate Warden of Pelican Bay, a California State prison, described the numerous instances of racial violence that have caused Pelican Bay to be on lockdown for most of the last couple of years. The current problems started on June 1, 1998, when a riot broke out involving 39 Northern and Southern Hispanic inmates. The Hispanic population was put on lockdown in Facility A and although attempts were made to lift the lockdown, the Southern population continued to be locked down for over 14 months. In August 1999, a controlled release of Southern Hispanics resulted in a number of incidents with Northern Hispanics. The numerical superiority of Southern Hispanics and the likelihood of future violence between the two groups caused the prison administrators to move all Northern Hispanics to other institutions. 90 inmates were involved in a riot between the Fresno Bulldogs and the Southern Hispanics on March 12, 1999.

On March 15, 1999, "White Supremacists" and "Skinheads" attacked whites that were not affiliated with a gang and Northern Hispanic inmates. In total, 31 inmates were involved in this fight.

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Three days later, a riot involving 39 inmates occurred when Northern Hispanics attacked white inmates. The inmates were placed on lockdown until April 14, 1999. On August 31, 1999, another riot occurred in which over 100 black inmates attacked a smaller number of white inmates. Nine days later, a racial disturbance involving seven black inmates and four white inmates occurred on the yard. On September 27, 1999, another riot occurred involving 30 black inmates and three white inmates.

A major racial riot, involving 250-300 inmates, broke out on February 23, 2000 when Southern Hispanics, joined by some of the white inmates, attacked the black inmates. Prison administrators were required to use lethal and non-lethal force to quell the riot. Sixteen inmates were shot, one fatally, and in all, 25 inmates were taken to outside hospitals. Again, the prison was placed on lockdown. On March 24, 2000, Facility A began to allow segregated releases, but Facility B remained on lockdown. In light of information that further assaults were going to take place, prison officials again locked down the prison and searched the complex. The search revealed 78 deadly weapons and 142 items of "dangerous contraband." Because of the continuing danger of racial conflict, the prison remained on lockdown. As of April 20, 2001, the prison officials had thus far failed to remove the lockdown without causing further violence. Declaration of B. O'Neil, Associate Warden of Pelican Bay, at 1-4 (Apr. 20, 2001).

Numerous other incidents involving racial violence in the prison system have been reported in the media. *See, e.g.*, Sue Fox, *Lancaster Prison Locked Down after Riot Hurts 10, L.A. Times*, Aug. 9, 2000, *available at* 2000 WL 2267920; *Racial Fight Erupts at Prison, San Diego Union Trib.*, Mar. 3, 2000, *available at* 2000 WL 13951973; Ben Goad, *Race Riot Hits Adelanto Prison: More than 100 men are moved out of the private facility*, *Press Enterprise* (Riverside, Ca.),

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207 (1985), *Turner* clearly does not require such a high threshold before a state can act. *See Abbott*, 490 U.S. at 417 ("We agree that it is rational for the Bureau to exclude materials that, although not necessarily 'likely' to lead to violence, are determined by the warden to create an intolerable risk of disorder under the conditions of a particular prison at a particular time."); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987) ("[*Turner*] ensures the ability of corrections officials 'to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. . . .' " (quoting *Turner*, 482 U.S. at 89)); *Harper v. Wallingford*, 877 F.2d 728, 733 (9th Cir. 1989) ("In the instant case, the defendants provided the penal institution superintendent's affidavit stating that the materials in question could lead to violence committed both by and against its readers. This constitutes a threat to prison security."); *see also Gates v. Rowland*, 39 F.3d 1439, 1447-48 (9th Cir. 1994). For example, in *Casey v. Lewis*, 4 F.3d 1516 (9th Cir. 1993), we held that under *Turner* anticipated security problems were sufficient to sustain regulations that were reasonably related to the problem, even though the

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Mar. 3, 2000, *available at* 2000 WL 7016883; Jeff Barnard, *Racial Fights an Inescapable Fact of Prison Life, San Diego Union-Trib.*, Feb. 26, 2000, *available at* 2000 WL 13950567; Steve Gessinger, *Violence Mounts as Racial Gangs War in Prisons, L.A. Sentinel*, Mar. 25, 1998, *available at* 1998 WL 11413300; Newsday, *Riot in Calif. Prison, 1 Dead, L.A. Times*, Sept. 28, 1996, *available at* 1996 WL 2538090; Newsday, *80 inmates Hurt in Calif. Jail Brawl*, Jan. 11, 1994, *available at* 1994 WL 7431676.

In short, this is hardly a case where the prison administrators are acting on an unsubstantiated record.

state did not cite a specific instance justifying its policy: "The [Arizona Department of Corrections's] failure to specify a past event wherein a contact visit resulted in assault, escape, or hostage-taking, does not render irrational the adoption and implementation of a non-contact policy." *Casey*, 4 F.3d at 1521. The CDC simply does not have to wait until inmates or guards are murdered specifically because race is not considered in assigning an inmate's initial cell mate; instead, *Turner* allows the administrators to stave off potentially dangerous policies without first "seeing what happens."

Under our precedent, if there is a common-sense connection between a legitimate objective and prison regulation, the inmate bears the burden of production.[10] *Frost v. Symington*, 197 F.3d 348, 357 (9th Cir. 1999). If the inmate fails to proffer sufficient evidence to refute a common-sense connection between the government's objective and the prison regulation, assuming that "the governmental objective is legitimate and neutral, *Turner*'s first prong is satisfied." *Id.* (internal citation omitted). On the other hand, if an inmate presents "sufficient (pre or post) trial evidence that refutes a common-sense connection between a legitimate objective and a prison regulation," *id.*, then the administrators bear the burden of proving that the "connection is not so 'remote as to render the policy arbitrary or irrational,' " *id.* (quoting *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999)).

10. Johnson cites a couple of cases from federal district courts where the defendants were required to prove the constitutionality of their policies. *See, e.g., Blevins v. Brew*, 593 F. Supp. 245, 248 (W.D. Wis. 1984); *Stewart v. Rhodes*, 473 F. Supp. 1185, 1190 (S.D. Ohio 1979). Post-*Turner*, this is no longer the appropriate analysis.

Given the admittedly high racial tensions and violence already existing within the CDC, there is clearly a common-sense connection between the use of race as the predominant factor in assigning cell mates for 60 days until it is clear how the inmate will adjust to his new environment and reducing racial violence and maintaining a safer environment. *See White v. Morris*, 832 F. Supp. 1129, 1130 (S.D. Ohio 1993) (noting that race-blind double-celling increased racial tensions in the Ohio prison system). *But see Stewart v. Rhodes*, 473 F. Supp. 1185, 1188 (S.D. Ohio 1979) (pre-*Turner* case holding that prison administrators could not rely upon " 'common sense' attitude toward overall relations between the races in the face of expert testimony supporting an equally 'common sense' attitude" that "segregation . . . tends to create racial misunderstandings and tensions"). Indeed, in a previous case before us, a prisoner, alleging an Eighth Amendment violation because administrators failed to consider race when releasing inmates into the yards, argued that "individual prison cells are segregated because it is widely understood that members of different races would attempt to kill each other solely on the basis of gang membership or race." *Robinson v. Prunty*, 249 F.3d 862, 862 (9th Cir. 2001). Thus, the burden to refute this connection lies on Johnson.

Johnson does not disagree that racial violence is pervasive in the CDC,[11] but instead argues that the high levels

11. Referring to a racial riot at Calipatria State Prison, a prison from which he had recently been transferred, Johnson stated, "If I would have stayed there, I would have been involved in that because you have four facilities there and each facility went on a major riot and a lot of people got hurt and injured just based upon your [*sic*] skin color. I'm Black, and if I was there I would have been hurt." Deposition of Garrison Johnson, at 35 (Oct. 4, 2000).

of racial violence are evidence that the CDC's housing policy does not work. Johnson proffered deposition testimony from prison officials stating that the housing policy has been in place for over 20 years and that racial violence continues to permeate the CDC. Johnson also argues that some gangs are not formed strictly along racial lines, and thus the administrators' use of race is irrational as it is connected to reducing gang violence. This, according to Johnson, is sufficient evidence to rebut the common-sense connection that using race as a factor in determining initial housing assignments reduces racial tension and violence.

Johnson, however, misconstrues the administrators' argument and his burden on this point. The administrators do not contend that their housing policy is a magical elixir designed to cure all the racial and gang tensions within the prison; they contend only that without their policy, racial violence, both within the cells and in the recreation areas, would increase. Johnson has failed to offer any evidence to refute this connection. Just because racial violence already exists does not mean that pre-existing policies do not work to reduce that violence from being even more pervasive than it already is. Similarly the fact that some gangs are not based along racial lines does not rebut the connection between gangs and racial violence in prisons,[12] which even Johnson concedes is a problem.

12. In the past, we have noted the connection between prison gangs and racial violence. *See, e.g., Stefanow v. McFadden*, 103 F.3d 1466, 1472 (9th Cir. 1996) ("Anyone familiar with prisons understands the seriousness of the problems caused by prison gangs that are fueled by actively virulent racism and religious bigotry.").

Because Johnson failed to refute the common-sense connection between the policy and prison violence, the "government was not required to make any evidentiary showing concerning the connection." *Frost*, 197 F.3d at 357. Instead, we must presume the governmental objective is legitimate. *See id.* We do not have to agree that the policy actually advances the CDC's legitimate interest, but only "whether the defendants might reasonably have thought that the policy would advance its interests." *Id.* at 355 (quoting *Mauro v. Arpaio*, 188 F.3d 1054, 1060 (9th Cir. 1999)). In short, "as long as it is plausible that prison officials believed the policy would further a legitimate objective, the governmental defendant should prevail on *Turner*'s first prong." *Id.*; *see also Casey*, 4 F.3d at 1521 (holding rational connection was established when the anticipated security concern was not "unreasonable"). Here, it is plausible, given the racial violence and tensions already present in the CDC and the knowledge that in other prison settings race-blind housing assignments have caused violence, that the administrators believe using race as one factor in making an initial housing determination is necessary for inmate and staff safety. Therefore, *Turner*'s first prong has been met.

B

The second factor we must consider under *Turner* is whether alternative means of exercising the right remain open to prison inmates. "Where 'other avenues' remain available for the exercise of the asserted right, courts should be particularly conscious of the 'measure of judicial deference owed to corrections officials . . . in gauging the validity of the regulation.' " *Mauro*, 188 F.3d at 1061 (ellipsis in

original) (quoting *Turner*, 482 U.S. at 90 (citations and internal quotation omitted)). Here, Johnson asserts the right to be free from race conscious decisionmaking while an inmate at the CDC.

In examining whether alternative means for Johnson to exercise his right exist, we must examine Johnson's right expansively and sensibly, *Abbott*, 490 U.S. at 417; thus, we must look to Johnson's right to be free from state-sponsored racial discrimination at a macro level, and not just the alleged violation, to determine whether alternatives open to the inmate exist. *Cf. id.* For example, in *Turner*, the Court viewed the alleged constitutional right at issue as the "freedom of expression" in totality, not the specific right to communicate with inmates at other institutions, although undoubtedly the restriction upon inmates' communication implicated their First Amendment rights. *Turner*, 482 U.S. at 92. The *Turner* Court held that because inmates had other means of expression available the inmates had alternatives to exercise their freedom of expression, even though their ability to communicate with inmates at other institutions was completely proscribed. *Id.* Likewise, in *O'Lone*, the Court held that inmates had reasonable alternatives to exercise their religious freedom by attending other Muslim ceremonies, even though they were prohibited from participating in the Jumu'ah religious ceremony in particular. 482 U.S. at 351; *see also Friedman v. State of Arizona*, 912 F.2d 328, 332 (9th Cir. 1990) (holding that inmates were not "denied 'all means of expression' of their religion" due to their ability to "participate in other aspects of their religion"). Accordingly, the correct analysis in this case is not whether the state has provided reasonable alternatives from the CDC's use of race

as a factor for the first 60 days, but whether the state has provided reasonable alternatives from racial discrimination in general.

We conclude it has. The policy in question lasts only 60 days—after which discrimination is no longer alleged—and there are no "black" cells or "white" cells. Moreover, the remainder of the prison is integrated in full without regard to race. There is no distinction based on race as to jobs, meals, yard and recreation time, and vocational and educational assignments. Just as the inmates in *Turner* and *O'Lone* had reasonable alternatives to exercise their constitutional rights, so too does Johnson.[13]

C

The third *Turner* factor requires us to examine what impact accommodating the inmate's asserted right will have on prison personnel, inmates, and the allocation of prison resources. *Turner*, 482 U.S. at 90. The CDC administrators contend that failing to consider race in making initial housing assignments would lead to increased racial violence both in the cells and in the common areas. The impact would be significant, jeopardizing the safety of all the inmates and prison staff.

13. Even if the alleged constitutional right, however, were viewed more narrowly and limited only to alternatives within the 60-day period, our ultimate conclusion would not be altered. *See Casey*, 4 F.3d at 1522 (refusing to remand to determine whether inmates had a reasonable alternative to the right at issue "because resolution of this factor in favor of the inmates would not alter our ultimate legal conclusion—that the *Turner* test of reasonableness is satisfied").

Johnson, however, contends that the administrators failed to proffer evidence that not using race as a factor would cause a strain on prison resources. Again, Johnson misconstrues *Turner*. The CDC does not have to prove that eliminating their policy would impact (1) prison personnel, (2) inmates, and (3) prison resources; rather, Johnson must prove that eliminating the CDC's housing policy would not affect one of these areas in a sufficient manner. *See Harper*, 494 U.S. at 227. Johnson has failed to do so.

To begin with, Johnson did not rebut the CDC's claim that racial violence would occur both in cells and in the recreation areas if the CDC did not take race into account. *See Frost*, 197 F.3d at 358 (noting that Plaintiff's failure to bear his burden on *Turner*'s first prong is relevant under the third prong as well). The administrators, moreover, affirmatively proffered evidence to show that inmate and guard safety would be compromised. The CDC administrators uniformly stated that failing to take race into account when making an initial housing decision would be dangerous to staff and inmates alike. Steven Cambra, the current CDC Director, in his declaration stated,

> If race were to be disregarded entirely . . . I am certain, based upon my experience with CDC prisoners, that there will be problems within the individual cells. These will be problems that the staff will have a difficult time controlling. I believe there will be fights in the cells and the problems will emanate onto the prison yards. With respect to inside individual cells, I do not feel that prison housing staff are adequately able to deal

> with the problems that could arise. . . . I feel that because there are limited staff to oversee numerous cells, it would be very difficult to assist inmates if the staff were needed in several places at one time.

Declaration of Steven Cambra, Acting Director of Corrections, in Support of Defendants' Motion for Summary Judgment, at 3 (April 9, 2001); *see also* Deposition of Linda L. Schulteis, Associate Warden at California State Prison-Lancaster, at 32 (Dec. 6, 2000) ("You cannot house a Japanese inmate with a Chinese inmate. You cannot. They will kill each other. They won't even tell you about it. They will just do it.").

The Court found similar testimony persuasive in *Turner*. In *Turner*, the Court stated, "Prison officials have stated that in their expert opinion, correspondence between prison institutions facilitates the development of informal organizations that threaten the core functions of prison administration, maintaining safety and internal security." *Turner*, 482 U.S. at 92. As a result, the Court held that the asserted right could "be exercised only at the cost of significantly less liberty and safety for everyone else, guards and other prisoners alike." *Id.*

Furthermore, prohibiting race to factor into the officials' decisionmaking process would have a "ripple effect" of not only increasing the level of violence within the cells, but in the common areas as well. *See, e.g., White*, 832 F. Supp. at 1130 (racially integrated double-celling attributed to a racial riot in which ten people were murdered); Steven Cambra,

Acting Director of Corrections, in Support of Defendants' Motion for Summary Judgment, *supra*, at 3; *cf. Turner*, 482 U.S. at 92; *Frost*, 197 F.3d at 358. "When accommodation of an asserted right will have a significant 'ripple effect' on fellow inmates or on prison staff, courts should be particularly deferential to the informed discretion of corrections officials." *Turner*, 482 U.S. at 90. Accommodating the inmates' rights, thus, would be dangerous to staff and inmates in the views of the CDC. Without contrary evidence that the accommodation of the inmates' rights would not affect inmate and staff safety, we must defer to the judgment of the administrators.

D

The fourth factor we must examine is whether reasonable alternatives to using race as a factor in the initial housing policy would "fully accommodate[ ] the prisoner's rights at de minimis cost to valid penological interests. . . ." *Turner*, 482 U.S. at 91. This is not a "least restrictive alternative test"; it is a reasonableness test. Thus, while the regulation need not be a perfect fit to the solution at hand, it cannot be an "exaggerated response." *Id.* at 90. "[T]he absence of ready alternatives is evidence of the reasonableness of a prison regulation. By the same token, the existence of obvious, easy alternatives may be evidence that the regulation is not reasonable, but is an 'exaggerated response' to prison concerns." *Id.* "The burden is on the prisoner challenging the regulation, not on the prison officials, to show that there are obvious, easy alternatives to the regulation." *Mauro*, 188 F.3d at 1062.

Appendix A

Johnson argues that officials could screen inmates (1) on the basis of professed gang affiliation or (2) by examining the inmates' racial animus or a history of interracial violence, but he again has proffered no evidence in support of his position. Johnson's first proposed solution—that the prison officials could ask inmates about their gang affiliation or racial biases—is disingenuous. There is little chance that inmates will be forthcoming about their past violent episodes or criminal gang activity so as to provide an accurate and dependable picture of the inmate. *See* Deposition of Linda L. Schulteis, Associate Warden at California State Prison-Lancaster, *supra*, at 24 (noting that Northern Hispanic inmates cannot come to a Southern institution without being in danger, but that they will not inform the staff), 32-33 (noting that Japanese and Chinese prisoners will not tell officials of their animosity toward one another). Certainly, if this information was offered by the inmate or if the CDC knew of the inmate's past violence against an ethnic group, the CDC should take it into account, and perhaps even has a duty to consider it when making its housing assignment. *See Harper*, 494 U.S. at 223 ("Prison administrators have not only an interest in ensuring the safety of prison staffs and administrative personnel, but also the duty to take reasonable measures for the prisoners' own safety." (internal citation omitted)); *Robinson v. Prunty*, 249 F.3d 862, 866 (9th Cir. 2001). Requesting that inmates provide potentially self-incriminating information themselves, however, does not provide sufficiently reliable data under which the CDC could make a meaningful decision. Without a guarantee of the veracity of the information, Johnson's argument does not provide a reasonable alternative.

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Johnson also has not shown that an examination of an inmate's past is reasonable. Even if a background check would provide accurate information regarding an inmate's propensity for racial violence outside prison, it is unclear whether that information would provide a true picture of an inmate's propensity for racial violence in prison; the inmate's attitude outside of prison regarding race may change once incarcerated. The same holds true for transferred inmates as well. The racial make-up or individual inmates of the new prison may cause a previously benign inmate to become potentially dangerous. The CDC cannot accurately gauge an inmate's propensity for racial violence without first observing him in this new environment.

Johnson also never answered how the CDC could accumulate the relevant information needed to make an informed housing decision. As discussed above, inmates are unlikely to be forthcoming regarding their potentially incriminating history of violence, and, thus, the CDC would have to conduct its own independent examination. There is no indication that an independent examination would not be more than a de minimis cost. Without some sort of showing that the CDC could accomplish its goals without incurring a significant cost, Johnson cannot prevail. *Mauro*, 188 F.3d at 1062.

Our decision that the CDC policy is not an "exaggerated response" is reinforced when we look to our Eighth Amendment Cruel and Unusual Punishment Clause jurisprudence. Prison authorities are required under the Eighth Amendment to "take reasonable measures to guarantee the safety of the inmates." *Farmer v. Brennan*, 511 U.S. 825,

832 (1994) (internal citations and quotations omitted); *Harper*, 494 U.S. at 223. *See generally Robinson v. California*, 370 U.S. 660 (1962) (applying the Eighth Amendment's Cruel and Unusual Punishment Clause to the states via the Fourteenth Amendment). In *Robinson v. Prunty*, 249 F.3d 862, 866 (9th Cir. 2001), we held that it was clearly established that such reasonable measures included taking an inmate's race into account when allowing inmates to enter the recreation yards. The court, in denying the prison administrators qualified immunity, held that the inmate's "evidence paints a gladiator-like scenario, in which prison guards are aware that placing inmates of different races in the yard at the same time presents a serious risk of violent outbreaks." 249 F.3d at 868. According to the court, the administrators were not entitled to qualified immunity because the law clearly established that their actions were unlawful. *Id.*

Similarly, the failure to take race into consideration in cell assignments could be considered "deliberate indifference" to prisoners' safety and could itself constitute a constitutional violation. Steven Cambra, the Acting Director of the CDC, noted the risk of personal liability if race were not considered in making housing decisions: "[I]f I just take two inmates and have total disregard for their ethnicity . . . I feel I am putting myself in a position that I could be charged with setting up one of them to be injured." Declaration of Steven Cambra, Acting Director of Corrections, in Support of Defendants' Motion for Summary Judgment, *supra*, at 3. To reduce its liability under the Eighth Amendment and to protect inmates, the CDC crafted a policy, assigning cell mates largely along racial lines for a limited time, so as to

decrease the risk of racial violence that the administrators are aware exists. Certainly, this is a reasonable response in light of the conflicting responsibilities that the CDC must balance.

V

Although there may be many ways in which to achieve the state's objective in reducing racial violence in the CDC, the path chosen by the State of California is reasonably related to the administrators' concern for racial violence and thus must be upheld. If this policy were implemented beyond the prison walls, undoubtedly, we would strike it down as unconstitutional. The prison system, however, is inherently different and we must defer our judgment to that of the prison administrators until presented evidence demonstrating the unreasonableness of the administrators' policy. The Supreme Court has instructed us that inmates bear a "heavy burden" to show that prison officials acted unconstitutionally, and in this case, Johnson failed to carry his burden. He presented little to no evidence and could not rebut the presumption of constitutionality that the administrators are afforded.

Because Johnson failed to prove that a constitutional violation could be made out, we need not reach the ultimate question of whether the CDC administrators are entitled to qualified immunity. *Saucier*, 533 U.S. at 201.

AFFIRMED.

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA DATED JULY 30, 2001

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

No. CV 95-1192 CBM (BQR)

July 30, 2001

GARRISON S. JOHNSON

v.

STATE OF CALIFORNIA, et al.

* * *

PRESENT

The Honorable Harry L. Hupp, Judge

* * *

PROCEEDINGS: MOTION FOR RECONSIDERATION

ORDER

The motion for reconsideration is granted on the issue of qualified immunity as to defendants James Rowland and James H. Gomez. The action is dismissed as to said

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defendants on the basis of qualified immunity by judgment signed and filed this date.

This matter has been transferred to this court for the decision of this motion only. All further proceedings will be before Judge Marshall.

Defendants Rowland and Gomez seek reconsideration of the denial in this court's order of June 11, 2001, of defendants' motion for summary judgment insofar as it seeks dismissal on the basis of qualified immunity. Reconsideration is sought in view of the decision of the Supreme Court on June 18, 2001, in *Saucier v. Katz* '01 121 SCT 2151, 2001 WL 67265. In the court's opinion, that case demands reconsideration of qualified immunity insofar as it applies to the cases of defendants Rowland and Gomez (but not as to defendant Cambra, against whom only injunctive relief is sought).

The court adheres to its view expressed in the order of 6/11/01 that there is a triable issue of fact on the Equal Protection question as to the policy of the California Department of Corrections (CDC) of initially segregating prisoners at the Inmate Reception Center and on transfer to any new prison on the basis of race. Defendants defended that policy on the basis of prisoner safety, citing substantial danger posed by the existence of mutually hostile race based gangs in the prison population, and on the necessity of taking certain time to analyze the danger on an individual basis to a newly arrived prisoner. This policy may on trial be held to conflict with the non-segregation rule for prisons announced in *Lee* '68 390 US 333, 19 LEd 2d 1212, applying the

standards laid down in *Turner* '87 482 US 78, 96 LEd2d 64. However, whether or not there is ultimately held to be a constitutional violation, qualified immunity for defendants Rowland and Gomez must be reconsidered in light of *Saucier.*

As to whether the law was clearly established in advance of the alleged actions of those defendants, an element of qualified immunity, there must be considered the caveat to the no-segregation rule stated in *Lee*, as follows: ". . . prison authorities have the right, acting in good faith and in particularized circumstances, to take into account racial tensions in maintaining security, discipline, and good order in prisons and jails." There are few cases applying this caveat in practical prison situations and its application in any particular situation is unclear. *Turner* makes clear that the test is one of deferential review. Applying the law of qualified immunity, the Supreme Court in *Saucier* makes it clear in reversing the Ninth Circuit that if there is any doubt about the clarity of the law, or what is reasonable in the circumstances, the defendant must be dismissed whatever the ultimate ruling on the constitutional principle might be. In this case, Rowland and Gomez were directors of CDC and administered the alleged discriminatory policy. They are sued for damages under § 1983 in their individual capacities. Under the *Lee* caveat quoted above, there is a reasonable argument that the CDC alleged policy does not violate the Equal Protection Clause. *Saucier* makes it clear that qualified immunity is a doctrine which is intended not to make a defendant stand trial even if there is an arguable constitutional violation which may be established against him unless the law is clear that the actions certainly violated the Constitution. While the Ninth Circuit may be argued to have

watered down this doctrine (at least in excessive force cases), it was emphatically corrected in *Saucier*, which this court must recognize and follow. There is no use pointing out that the Supreme Court left trial courts rudderless in how actually to apply qualified immunity where the facts are not undisputed—what the Supreme Court did in *Saucier* is to make it clear that, in effect, when in doubt, qualified immunity must be granted before trial. Sobeit.

The action is dismissed on the basis of qualified immunity as to defendants Rowland and Gomez. Since monetary relief is not requested as to defendant Cambra, he has properly not asked for qualified immunity.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JULY 28, 2003

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 01-56436

D.C. No.
CV-95-01192-CBM
Central District of
California,
Los Angeles
ORDER

Filed July 28, 2003

Before: Procter Hug, Jr., Melvin Brunetti, and Diarmuid F. O'Scannlain, Circuit Judges

Order; Dissent by Judge Ferguson

GARRISON S. JOHNSON,

Plaintiff-Appellant,

v.

STATE OF CALIFORNIA; JAMES H. GOMEZ, DIRECTOR, DEPARTMENT OF CORRECTIONS; JAMES ROWLAND,

Defendants-Appellees.

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ORDER

The panel has voted unanimously to deny the petition for rehearing. Judge O'Scannlain voted to deny the petition for rehearing en banc, and Judges Hug and Brunetti so recommended.

The full court was advised of the Suggestion for Rehearing En Banc. A judge of this court requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration.

The Petition and the Suggestion are thus DENIED.

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FERGUSON, Circuit Judge, with whom Circuit Judges PREGERSON, D.W. NELSON, and REINHARDT join, dissenting from our court's denial of rehearing en banc.

I respectfully dissent from the order denying rehearing en banc. Over thirty years ago, the Supreme Court sought to end officially sanctioned racial segregation in our prison system by striking down statutes requiring "segregation of the races in prisons and jails" as violating the Fourteenth Amendment. *See Lee v. Washington,* 390 U.S. 333, 334 (1968) (per curiam). The panel's opinion threatens to undo that achievement by altogether removing the burden on prison officials to justify fundamentally suspect policies classifying prisoners on the basis of race. The decision impermissibly construes the Court's decision in *Turner v. Safley,* 482 U.S. 78, 89 (1987), to overrule *Lee,* in the process failing to accord to the Supreme Court the exclusive "prerogative [to] overrul[e] its own decisions." *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 484 (1989). The panel's decision ignores the Supreme Court's repeated and unequivocal command that "all racial classifications imposed by the government 'must be analyzed by a reviewing court under strict scrutiny.' " *Grutter v. Bollinger,* 123 S. Ct. 2325, 2337 (2003) (quoting *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200, 227 (1995)), and fails to recognize that *Turner* analysis is inapplicable in cases, such as this one, in which the right asserted is not inconsistent with legitimate penological objectives.

Appendix C

I. Strict Scrutiny is the Applicable Standard for All Race-Based Government Classifications, Regardless of the Government Actor

In cases decided both before and after *Turner v. Safley,* the Supreme Court has clearly held that government classifications based on race are, without exception, subject to strict scrutiny. *See id.; see also Adarand,* 515 U.S. at 227; *Richmond v. J.A. Croson Co.,* 488 U.S. 469, 493 (1989). The purpose of strict scrutiny is to " 'smoke out' illegitimate uses of race by assuring that [a state actor] is pursuing a goal important enough to warrant use of a highly suspect tool. The test also ensures that the means chosen 'fit' this compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.' " *Adarand,* 515 U.S. at 226 (quoting *Croson,* 488 U.S. at 493). The fact that a racially discriminatory classification scheme has a "benign" or well-intentioned purpose does not relieve a government actor from the burden to justify such a policy. *See id.*

Consistent with the rule requiring strict scrutiny for all government actors, the Court's per curiam decision in *Lee* placed the burden on prison officials to justify segregationist policies, embracing in affirmance the Alabama District Court's rejection of prison officials' argument that "the practice of racial segregation in penal facilities is a matter of routine prison security and discipline and is, therefore, not within the scope of permissible inquiry by the courts." *Washington v. Lee,* 263 F. Supp. 327, 331 (M.D. Al. 1966); *see also Lee,* 390 U.S. at 334. Although the *Lee* Court acknowledged prisons' continuing need to make "allowance

for the necessities of prison security and discipline," 390 U.S. at 334, *Lee* nevertheless applied heightened scrutiny to the contested regulations, as cases construing *Lee* have made clear. In *Hudson v. Palmer*, for example, the Court cited *Lee* for the holding "that invidious racial discrimination is as intolerable within a prison as outside, except as may be *essential* to 'prison security and discipline.' " 478 U.S. 517, 523 (1984) (quoting *Lee*, 390 U.S. at 334) (emphasis added). More recently, Justice Scalia specifically noted that *Lee's* "necessities" exception is applicable "only [in] a social emergency rising to the level of imminent danger to life and limb . . . [such as] a prison race riot." *Croson*, 488 U.S. at 520-21 (Scalia, J., concurring); *see also Grutter*, 123 S. Ct. at 2352 (Thomas, J., dissenting) (citing *Lee* as "indicating that protecting prisoners from violence might justify narrowly tailored racial discrimination.").

The panel concedes that the Court's decision in *Lee* has direct application in this case, *Johnson v. Rowland*, 321 F.3d 791, 797-98 (2003), but nevertheless determines that *Turner* is controlling. *Id.* at 798. The panel announces, without citing any support for its contention, that *Turner* "was not merely a cosmetic change in the Court's language . . . [it] lowered the prison administrators' burden to justify race-based policies [and placed this 'heavy burden' on] the inmate." *Id.* at 798-99. Implicitly, the panel presumes that *Lee* required a heightened standard, but notes that even if "Johnson is correct that *Lee* would have required actual violence . . . Johnson's argument cannot withstand our consistent application of *Turner*." *Id.* at 801 n. 8.

No Supreme Court case supports the panel's claim that *Turner* applies in the context of suspect-class equal protection claims, let alone that it implicitly overruled *Lee*.[1] In light of *Lee's* directly controlling holding and the Supreme Court's repeated command to apply strict scrutiny to all race-based classifications, the panel simply does not have the authority to interpret *Turner* as requiring a different level of review. "If a precedent of th[e Supreme] Court had direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to th[e Supreme] Court the prerogative of overruling its own decisions." *Rodriguez de Ouijas*, 490 U.S. at 484; *see also Hohn v. United States*, 524 U.S. 236, 252-53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."). The panel may not lower the standard that has been clearly articulated in Supreme Court case law in order to allow the policy to survive review.

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1. Even *Washington v. Harper*, 494 U.S. 210, 224 (1990), upon which the panel partially relies, did not suggest that prison officials, in contrast to *all* other government actors, are relieved from the obligation to justify race-based policies by presenting a compelling interest and a narrowly tailored solution. Although *Washington v. Harper* purported to control every subsequent prison case, *see Washington*, 494 U.S. at 224, it cannot do so. "[G]eneral expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision." *Cohens v. Virginia*, 19 U.S. 264, 399 (1821).

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The effect of the panel's dismissal of the relevant Supreme Court case law is to create a dangerous and unwarranted exception to the general rule for prison officials. If military officials acting during wartime are subject to strict scrutiny, *see Toyosaburo Korematsu v. United States,* 323 U.S. 214, 217-18 (1944), then certainly prison officials engaging in the routine performance of their duties should be subject to it as well. Nevertheless, the opinion presumes that prison officials are so uniquely free of the taint of racism that an exception should be created just for them.

Our race-based equal protection jurisprudence does not permit an exception to the strict scrutiny rule. " 'Absent searching judicial inquiry into the justification for . . . race-based measures, there is simply no way of determining . . . what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics.' " *Adarand,* 515 U.S. at 226 (quoting *Croson,* 488 U.S. at 493). " '[B]ecause classifications based on race are potentially so harmful to the entire body politic, it is especially important that the reasons for any such classifications be clearly identified and unquestionably legitimate . . . racial classifications are simply too pernicious to permit any but the most exacting connection between justification and classification.' " *Id.* at 236 (quoting *Fullilove v. Klutznick,* 448 U.S. 448,.533-35 (1980) (dissenting opinion)).

Deferring to the alleged "common-sense" of state officials on matters of race is fundamentally at odds with the requirements and purpose of the Fourteenth Amendment. *See Adarand,* 515 U.S. at 228. Yet this is precisely what the panel does by holding that the governmment is "not required

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to make any evidentiary connection concerning the connection [between the policy and prison violence]." *Rowland,* 321 F.3d at 803 (quoting *Frost v. Symington,* 197 F.3d 348, 357 (9th Cir. 1999)).[2] Regardless of the potential for abuse, the decision holds that reviewing courts must defer to prison official's "common sense" as to whether there is a legitimate safety concern, and must presume that what prison officials "feel" might happen is actually what will happen.[3]

Under the panel's test, if a prison official were to announce that prisoners could no longer visit with spouses or children of a visibly different race, based on the official's entirely unsupported belief that there would be subsequent racial violence based on the sometimes charged nature of interracial relationships, we would have to shrug our shoulders and defer. The prisoner would have to prove that there would *not* be a riot, which, in a racist society, would simply never be possible. It is certainly "plausible" that such a riot could ensue: our society, as well as our prisons, contains enough racists that almost any interracial interaction could

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2. Although the panel asserts that "the high level of racial violence in the [prison] is well documented" and that "this is hardly a case where the prison administrators are acting on an unsubstantiated record," *id.* at 801 n. 9, the bulk of the facts the panel presents are, legally speaking, irrelevant; nothing in the decision's holding requires the prison to justify the policy in any real fashion.

3. The prison official affidavits relied on by the panel do not cite one concrete instance or statistical example of racial violence, instead referring only to the unsubstantiated "beliefs" of prison officials about what they presume will happen.

potentially lead to conflict. *See Adarand,* 515 U.S. at 237 ("the unhappy persistence of both the practice and lingering effects of racial discrimination against minority groups in this country is an unfortunate reality."). More to the point, our society, as well as our prisons, contains an abundance of persons who *believe* that *any* cross-racial interaction is dangerous, regardless of whether their beliefs are based in fact.[4]

Both the Fifth and the Seventh Circuits have refused to accord such extreme deference, recognizing that, in the context of race, more must be required. In *Sockwell v. Phelps*, the Fifth Circuit considered and rejected a policy nearly identical to the one put forth by the prison in this case and supported by nearly identical "safety" justifications. *See* 20 F.3d 187, 191-92 (5th Cir. 1994).[5] The *Sockwell* court

4. The panel's assertion that it is patently obvious that the policy makes good "common-sense" is, in fact, belied by studies addressing the question. *See* Chad Trulson & James W. Marquart, *The Caged Melting Pot: Toward an Understanding of the Consequences of Desegregation in Prisons,* 37 LAW & SOC'Y REV. 743, 774 (2002) (study of inmate-on-inmate assault data which found that "over [ten years], the rate of violence between inmates segregated by race in double cells surpassed the rate among those racially integrated.").

5. In *Sockwell*, Texas prison authorities actually presented more concrete evidence than what was offered in the instant case. In support of their contention that racially segregated two-man cells were needed to increase security, they asserted that:

> (1) prison guards were unable to visually monitor each . . . cell; . . . (3) two instances occurred in which black

(Cont'd)

implicitly rejected *Turner,* placing the burden of proof to justify the policy on prison authorities and refusing to accept the prison authorities' "generalized or vague fear of racial violence [as] a sufficient justification for a broad policy of [residential] racial segregation." 20 F.3d at 191.[6] Similarly, in *Black v. Lane,* 824 F.2d 561, 562 (7th Cir. 1987) (decided subsequent to *Turner*), the Seventh Circuit specifically held that "absent a compelling state interest, racial discrimination in administering prisons violates the Equal Protection Clause." *Id.* (citing *Wolff v. McDonnell,* 418 U.S. 539, 556 (1974)).

Other portions of the panel's analysis reveal just as starkly the trouble with applying *Turner's* reasoning to a race-based equal protection claim. For example, in finding that Johnson has a "reasonable alternative" to exercise his right to be free from discrimination because he is not subject to segregation during meals and recreational time, the panel

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> and white prisoners housed together became violent; (4) racial supremacy groups existed within the prison ranks; and (5) interracial conflict may have triggered more generalized racial violence.

20 F.3d at 191.

6. Contrary to the panel's suggestion, *see Johnson v. Rowland,* 321 F.3d at 797 n. 5, the fact that there appeared to be disparate treatment between the cells did not play any role in the *Sockwell* court's analysis. *See* 20 F.3d at 191. Unlike the panel, the *Sockwell* court was not under the illusion that racially discriminatory government policies are acceptable so long as they produce "equal" results. *See Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

essentially asserts that if the state only discriminates sometimes, no harm is done. *See Johnson v. Rowland*, 321 F.3d at 804. This close-enough argument is akin to asserting that if a school-child only has to go to a segregated school one-third of the year, the requirements of *Brown v. Board of Education* are met. As the District of Columbia Circuit stated in *Pitts v. Thornburgh*, the right to be free from discrimination is the right to be free from a particular, definite, constitutional harm, not the right to engage in a particular activity or associate with particular persons. *See* 866 F.2d 1450, 1455 (D.C. Cir. 1989) ("While an equal protection claim . . . is, in one sense, a personal right . . . the claim is also a demand that government action that affects an individual not be predicated upon constitutionally defective reasoning."); *see also Adarand*, 515 U.S. at 229-30.

When it comes to matters of race, the "common-sense" of state officials is frequently the opposite of sensible or rational, and a searching inquiry into the motives and alternatives to the state actor's plan is therefore required. The Fourteenth Amendment simply does not permit any level of review except for strict scrutiny, let alone the excessive deference that the panel applies.

There is little merit to the panel's suggestion that strict scrutiny of race- based policies would unnecessarily limit prison officials' ability to effectively manage prisons or open the floodgates to frivolous litigation. Recognizing that there are unique circumstances under which a race-based classification may be permissible, the Supreme Court has specifically rejected the notion that "strict scrutiny is[ ] 'strict in theory, but fatal in fact.' " *Grutter*, 123 S. Ct. at 2338

(quoting *Adarand*, 515 U.S. at 227). "Not every decision influenced by race is equally objectionable and strict scrutiny is designed to provide a framework for carefully examining the importance and sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context." *Id. Grutter* makes clear that strict scrutiny still allows for a measure of deference to government actors acting within their particular sphere of competence. *Id.* at 2339. However, the "scrutiny of the interest asserted by [government actors] is no less strict for taking into account complex . . . judgments in an area that lies primarily within [their] expertise." *Id.* The burden is squarely on the government to establish both that its interest is compelling and that its means are narrowly tailored.

It is perfectly possible that a prison could develop a race-based policy that would survive strict scrutiny analysis, given the clearly compelling interest in maintaining safety and order in prisons. Indeed, it is possible, even likely, that prison officials could show that the current policy meets the test. Contrary to the panel's suggestion, imposing the burden of justifying such policies on prison administrators is not unduly burdensome, given (I assume) the exceptional rarity of policies that are openly discriminatory. While any review of prison policies requires the court to appreciate the difficulties encountered by prison officials in maintaining a safe environment, *see Pitts*, 866 F.2d at 1455, it is simply not the case that either *Turner* or any other case in the Supreme Court's equal protection jurisprudence permits prisons to engage in racial discrimination without a compelling justification and a showing that the policy is narrowly tailored to meet the alleged safety need.

II. *Turner* Analysis Does Not Control Where, As Here, the Right Asserted Is Not Inconsistent with the Legitimate Objectives of the Penal System

Turner analysis is inapplicable not only because the Supreme Court has clearly stated that strict scrutiny applies in all cases in which the government creates racial classifications, but because the constitutional right at issue is not "inconsistent . . . with the legitimate penological objectives of the corrections system." *Pell v. Procunier,* 417 U.S. 817, 822 (1974). As the Supreme Court's most recent prison case makes clear, a consideration of whether the right at issue is "inconsistent with proper incarceration" is a crucial step in determining whether or not *Turner* analysis applies. *See Overton v. Bazzetta,* 123 S. Ct. 2162, 2167 (2003); *see also Jones v. North Carolina Prisoners' Union,* 433 U.S. 119, 125 (1977) (rejecting inmate First Amendment claim where "ban [on solicitation and meetings] . . . was rationally related to the reasonable, indeed to the central, objectives of prison administration."); *Jordan v. Gardner,* 986 F.2d 1521, 1530 (9th Cir. 1993) (rejecting application of *Turner* analysis in context of Eighth Amendment claim).

An individual's right to be free from state imposed racial discrimination cannot plausibly be said to be "inconsistent with the legitimate penological objectives of the corrections system," nor can it be said that a prison official's ability to discriminate between prisoners based on race is "central [to] the objectives of prison administration." Like the Eighth Amendment prohibition of cruel and unusual punishment, the Fourteenth Amendment's ban on invidious state discrimination specifically contemplates a limitation on state

power that is "complementary" to the goals of effective imprisonment. *See Jordan,* 986 F.2d at 1530; *see also Pitts,* 866 F.2d at 1455. For this reason, the right to be free from state-sponsored segregationist policies is qualitatively different from other rights to which *Turner* has been applied. *Cf. Overton,* 123 S. Ct. at 2167 (applying *Turner* to freedom of association claims relating to family visitation); *Shaw v. Murphy,* 532 U.S. 223, 228 (2001) (applying *Turner* to inmate first amendment challenge to prison regulation restricting inmate correspondence); *Washington v. Harper,* 494 U.S. 210, 221-23 (1990) (applying *Turner* in context of due process challenge to involuntary medication of mentally ill prisoner); *O'Lone v. Shabazz,* 482 U.S. 342, 349-50 (1987) (applying *Turner* in case challenging right of prison to limit attendance at particular religious services).

Unlike the rights asserted in previous prison cases, the right to be free from state-sponsored segregation is central to the legitimacy of our system of justice, including the penal system. In the same way that the Eighth Amendment embodies an understanding that the penal system loses legitimacy to the extent that its methods are abhorrent on their face, so too the Fourteenth Amendment acknowledges that government power retains legitimacy in direct proportion to the extent that its objectives are carried out free of the stigma of inequitable or discriminatory classification systems, especially ones based on inherently arbitrary factors like race.

In *Pitts,* the District of Columbia Circuit explicitly rejected the application of *Turner* in the context of a suspect class equal protection claim. *Pitts,* 866 F.2d at 1453. Although the claim involved issues that did "not directly

implicate either prison security or control of inmate behavior," *id.* at 1454, the Court specifically noted that the Supreme Court "has commanded [that suspect classifications] demand[ ] the court's special attention." *Id.* at 1454-55. The *Pitts* court also noted that the fact that an equal protection claim "charges invidiousness, rather than an unwarranted interference with constitutionally secured liberties," was relevant to the level of scrutiny it applied. *Id.* at 1455.

In short, *Turner* analysis is simply not applicable when the right at issue is not only not inconsistent with, but complementary to the needs of effective imprisonment. The panel's failure to recognize this distinction renders an already erroneous decision even more problematic.

* * *

The panel's decision gives *carte blanche* to prison officials to impose their own notions of racial hatred and conflict upon prisoners, regardless of whether these notions are based in fact or deeply-held stereotypes. The decision ignores the applicable standard of review and the primary purpose of the Fourteenth Amendment's prohibition on racial discrimination, which is to limit states' power to create fundamentally suspect racial classification schemes. I therefore dissent from the denial of rehearing en banc.